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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA Plaintiff, vs. ROGER DELANE WILSON, Defendant.	Case No. **CR201700516** Hon. James L. Conlogue DIVISION V **STATE'S RESPONSE AND OBJECTION TO DEFENDANT'S MOTION TO ADMIT EVIDENCE OF AGGRESSIVE ACTS OF THE VICTIM**

The State of Arizona, through the Cochise County Attorney, Brian M. McIntyre, and Lori A. Zucco, his Chief Criminal Deputy, hereby submits the State's Response and Objection to Defendant's Motion to Admit Evidence of Aggressive Acts of the Victim with the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On November 15, 2019 Defendant provided the State his Rule 15 Disclosure Statement (Exhibit 1). Ironically, this was provided to the state 11 days after what was supposed to be the beginning a trial in this matter, a trial which was continued as a "sanction" for State's "late" disclosure of a witness, who was disclosed more

than 45 days before the November 4, 2019 start of trial.

Defendant's disclosure statement lists five (5) civilian witnesses, followed by "- 404B." The disclosure statement fails to list exactly what evidence each of the witnesses will purportedly testify to, and the Defense also failed to provide any written statements from the witnesses, or summaries of their proposed testimony.

Defendant's Motion to Admit Evidence states the following:

- "There is a lengthy history of confrontation and aggressiveness between Mr. Wilson and (the victim)."

The State is aware of the confrontation witnessed by Michelle Lindsay 1-2 weeks prior to the homicide where the victim punched Defendant, and the incident at Robert Burton's house minutes prior to the homicide, but the State is unaware of any other incidents between Defendant and the Victim. If the Defense wishes to introduce this evidence, the State requests that the Defense disclose what incidents they are referencing and which of their witnesses will testify to the events. The State agrees that the incident witnessed by Ms. Lindsay and the incident at Robert Burton's house should be admitted at trial.

- "Statements of several witnesses as well as information contained in police reports, and grand jury transcripts, indicate that there were past incidents of theft and robberies for which (the victim) was the suspected perpetrator, and Mr. Wilson or one of his family members were the victims."

The State has disclosed all police reports found in Spillman for Defendant, his

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family to include his mother Jan Wilson, his father Lonnie Wilson, and his nephew Kale Parker, as well as the victim, and the State is unaware of any investigations in which the victim was suspected of committing a theft or robbery upon Defendant or one of his family members. If Defendant intends to allege an incident like this, the Court should require him to disclose the facts and circumstances surrounding the theft or robbery and notify the State as to what witness he will call to testify about the incidents.

- "(the victim) had tattoos showing gang affiliation, and his mother actually acknowledged her son's gang affiliation on Facebook posts after his death." Defendant has not disclosed which witnesses will testify that the victim's tattoos are gang affiliated, or what the reputation of that particular gang might be. Defendant, in his recorded interview, repeatedly states that the victim is a "Five Dollar ($5) Gangster" but Defendant admits that this is a name and "gang" that he himself came up with ("with my brand for "JD" and his kind of people's type of antics. I call them Five Dollar Gangsters. That's my brand that I have on JD's clan or Nikko's clan. Both of them can't help their situation. Lack of guidance if you ask me. But, however I named him is what I call'em. Five Dollar Gangsters." Defendant recorded interview p. 9 l. 13-16, Exhibt 2).

Defendant never mentions that he believes or is aware that the victim is in an actual street gang, what that gang's reputation might be, or that Defendant has tattoos reflecting gang affiliation. If the victim was in a gang, other than the made

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up "Five Dollar Gangsters," his gang affiliation was unknown to the Defendant.

When a defendant argues self-defense, evidence of the victim's gang membership may be admissible under Rule 404(b), Ariz. R. Evid., "to show that the defendant was justifiably apprehensive of the decedent and knew that the decedent had a violent disposition." *See State v. Taylor,* 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991); *State v. Zamora,* 140 Ariz. 338, 341, 681 P.2d 921, 924 (App.1984). However, to support reasonable apprehension by the defendant, there must be evidence that the defendant was aware of the gang affiliation, *see State v. Fish,* 222 Ariz. 109, ¶¶ 36–37, 213 P.3d 258, 270–71 (App.2009), and knew the gang to be violent, *see Zamora,* 140 Ariz. at 341, 681 P.2d at 924.

Furthermore, neither party is intending to call the victim's mother to testify so her alleged assertions on Facebook are hearsay, as well as irrelevant.

- "(the victim's) use of methamphetamine is directly relevant to the issue of whether he was aggressor in the fatal confrontation with Mr. Wilson."

The State is aware that the Court will most likely permit the victim's toxicology report that shows methamphetamine in his blood. Likewise, the State intends to introduce evidence that Defendant smoked methamphetamine during the day of the incident and at Robert Burton's house with Lizbeth Eveningred, that Defendant asked Robert Burton if he could take a hit from his meth pipe at his house prior to the homicide, and that Defendant previously smoked methamphetamine with Michelle Lindsay. Defendant's methamphetamine use is also relevant to show that

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Defendant was the initial aggressor and that he was not acting reasonably when he shot the unarmed victim in the roadway.

- "The general reputation of (the victim) is relevant to the defendant's state of mind at the time of the incident." Defendant then goes on to completely mischaracterize statements made by Michell Lindsay at a defense interview.

Michelle Lindsay sat for a defense interview on September 6, 2019. She stated that "(the victim's) reputation wasn't great, he wore baggy pants, he wanted to be a gangster. I think he wanted to be buried in a zoot suit, so that kind of said it all haa (laughing). . . he was all about that . . . I don't think he had gang tattoos, I can't remember, but he did have tattoos." (Exhibit 3, p. 12 l. 20-27). She was asked if Defendant professed to be any particular gang and she stated "No he just . . . it was, it was funny cause like he would try really hard, but he did have a really sweet heart so it was like you're not fooling anybody but you look like you could be gangster, but you're not haa (laughing) and (the victim) did have kind of a reputation as – trying to be a gangster haa (laughing)" (Exhibit 3 p. 12 l. 29 – p. 13 l. 5).

Michelle Lindsay was asked if the victim had a reputation of being a fighter or a guy who gets into confrontations and she responded "Mm not really, uhm I know that he was kind of a hot head and he'd go off on some stupid stuff you know, but I mean I never saw it first hand, I saw him go off and he would just talk shit but it wasn't, I'd never seen him pick a fight with anybody that was the first time." (Exhibit 3, p. 13 . 8-13).

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Ms. Lindsay was then asked if the victim had a reputation for being a thief to which she replied, "I heard that, but in honesty in the neighborhood that I was in, everybody seemed to have that reputation . . . I heard it about (the victim) I've heard it about me, you know we were all just not in a good situation. We were getting high, drinking like it was just . . . usually meth heads have the reputation of being thieves." (Exhibit 3. P. 14 l. 28- p. 15 l. 4).

LAW:

I. OTHER ACT EVIDENCE MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE BEFORE IT CAN BE ADMITTED.

As an initial matter, to determine whether specific act evidence is admissible under Rule 404(b) a court must first determine whether the evidence is clear and convincing. *State v. Fish,* 222 Ariz. 109, 123 (Ariz. App. Div. 1 2009). As noted above, the defense has not properly indicated which witnesses will testify as to which other acts.

Police reports are of course hearsay evidence and the witnesses to the acts that are merely referenced by report number would have to be called to testify. One of the witnesses who is alleged to have witnessed a specific instance, Manny Romero, has a felony criminal history and will need to testify and be subject to impeachment and cross examination before the Court can find whether the evidence is clear and convincing.

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II. ACTS UNKNOWN TO THE DEFENDANT ARE IRRELEVANT, INADMISSIBLE EVIDENCE, AND THEIR PROBATIVE VALUE IS OUTWEIGHED BY THEIR PREJUDICIAL EFFECT.

While evidence of the victim's character unknown to a defendant at the time of the shooting may be admissible to prove the victim was the aggressor, Rule 404(a)(2) and 405 limit the evidence to general reputation evidence, permitting specific act evidence only when the character of the victim is an essential element of the defense or on cross-examination. *State v. Fish,* 222 Ariz. 109, 118 (Ariz. App. Div. 1 2009).(Citations omitted). A victim's character is not an element a party must prove to make out a prima facie case of self-defense; therefore, it is not an "essential element" of self-defense under Rule 405(b). *State v. Fish*, 222 Ariz. 109, 119 (App. 2009).

Defendant concedes that he did not know about the alleged aggressive conduct of the victim listed in Subsection III (p. 7-8) of his motion. Defendant offers these specific instances of conduct to prove the victim's violent character and conformity therewith on the night in question. Thus, the evidence should be excluded pursuant to Rules 404(a)(2) and 405(a)–(b). *Fish* at 121.

The *Fish* Court similarly rejected a defense argument that unknown prior violent acts of the victim were admissible to show Defendant's state of mind and his reasonableness in using force in self-defense. *Fish* at 122. Again, unknown acts of the victim in this case should be precluded for this purpose on the same grounds.

Defendant further argues that the victim's alleged prior acts are so similar to

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his alleged conduct on the night in question that evidence is admissible to corroborate Defendant's claim that the victim "was there to rob and assault him."

A review of the list of alleged other acts shows otherwise:

1. The victim allegedly attempted to break into his brother's house. DR17-00160. The narrative from that report reads as follows:

Jesus stated on 1-3-2017 he and his brother Joel were driving on S Santa Ana Ave and were enroute to drop off their friend Ted some food. Jesus stated they saw (the victim) walking towards them and he began jumping as if he was going to fight them. Jesus stated they passed by him and tried to avoid him; Jesus stated Jose threw a full beer can at their SUV and hit the driver side rear door. Jesus stated Jose began running away and they lost him somewhere near S Camino Segundo. Jesus stated he then contacted law enforcement.

The report was closed due to uncooperative adult victims. The incident is nothing like the incident in question.

2. The victim verbally abused a clerk and was trespassed from a business. Not similar at all to our incident.
3. The victim allegedly got into a fight with his father. Not similar at all to our incident.
4. The victim allegedly had a fight with his girlfriend. Not similar at all to our incident.
5. The victim allegedly shoplifted and was disorderly. The State is unable to find a record of an alleged shoplifting from the date given and was not provided with any additional information. An alleged shoplifting is not similar at all to our incident.

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6. The victim allegedly participated in a drive by shooting upon Manny Romero. The State has not found any police reports regarding this incident, Mr. Romero is a convicted felon, the victim is not alleged by anyone, including Defendant, to have been carrying a gun or weapon of any kind on the night of the homicide. This alleged incident is not similar at all to the incident in question.

The other acts unknown to Defendant are factually dissimilar to the facts and circumstances surrounding the homicide in this case and should be precluded. *Fish* represented "unique facts" *See State v. Leday,* 2017 WL 1323354 (App. 2017)(memorandum decision, cited as persuasive authority pursuant to Ariz.R.Sup.Ct. 111.c.1 copy attached Exhibit 4)(victim's prior drive by shooting conviction not admissible under *Fish* in homicide trial because factually dissimilar) that are not present in this case, and the Court should find the evidence to be inadmissible.

In Fish, there were no other witnesses to the incident and the specific and unique behavior of the victim with regards to his dogs was reported immediately after the incident by the defendant, and was later specifically corroborated by independent witnesses. The *Fish* Court even stated, "[t]his does not mean that in any self-defense claim prior acts of a victim unknown to the defendant at the time of the alleged crime are always admissible to corroborate the defendant's claim. *Fish* at 125.

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Even assuming for the sake of argument that Rule 404(b) applies in this case as it did under the unique facts of *Fish*, *see* 222 Ariz. 109, 125, the evidence is still inadmissible pursuant to Rule 403, *see Fish*, 222 Ariz. 109 at 125, as the probative value is outweighed by the prejudicial effect.

CONCLUSION:

Wherefore, for the forgoing reasons, Defendant's Motion to Admit Evidence of Aggressive Acts of the Victim should be **DENIED.**

RESPECTFULLY SUBMITTED this 25th day of November 2019.

COCHISE COUNTY ATTORNEY

By: _____

LORI ANN ZUCCO
Deputy County Attorney

Copy of the foregoing
mailed/delivered/faxed
this 25th day of November 2019 to:

The Honorable James L. Conlogue
Judge of the Superior Court
Division V
Bisbee, Arizona 85603

Steven D. West, Esq.
Attorney for the Defendant

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EXHIBIT 1

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, v. ROGER DELANE WILSON, Defendant.	)	Case No.: CR 2017-00516 **DEFENDANT'S RULE 15 DISCLOSURE** Assigned to Hon. James L. Conlogue

COMES NOW, the Defendant, by and through undersigned counsel, and pursuant to Rule 15 of the Arizona Rules of Criminal Procedures, submits:

I.

NOTICE OF DEFENSES

1. Lack of Proof Beyond a Reasonable Doubt
2. Lack of Criminal Intent
3. Insufficiency of Evidence
4. Self-Defense
5. Defense of property

II.

WITNESSES

1. The Defendant may be called to testify.

2. All persons and officers alluded to or named in the State's Disclosure and/or police reports, and/or Grand Jury Transcripts.

3. The defense may call Kenneth Dagostino, a private investigator, to testify regarding his investigation in this matter.

4. The defense may call Rod Rothrock, a private investigator, to testify regarding his investigation in this matter.

5. Brad Blumberg - 404 B

6. Dominick Brandt - 404B

7. John Hanson - 404B

8. Manuel Romero - 404B

9. Aubrey Stram - 404B

10. Other witnesses not yet ascertained will be disclosed upon discovery of the same.

EXPERT WITNESSES

11. The Defense will call Weaver Barkman of Barkman and Associates, LLC to testify regarding errors and mistakes made during the initial investigation and subsequent investigations. Mr. Barkman is a Private Investigator and Expert in the crime scene investigations.

12. The Defense will call Dr. Edward French, a Doctor in the field of Pharmacology, regarding the level of methamphetamine found in the decedent and its effects.

III.

EXHIBITS

1. The Defendant may introduce at trial any exhibits, documents, photographs or other tangible objects which are alluded to or named in State's Disclosure and/or police reports and/or Grand Jury Transcripts.

2. Weaver Barkman's Report of Analysis and Conclusions

3. Other exhibits, documents, photographs and other tangible objects which the Defendant will introduce at trial are not yet ascertained, but will be disclosed upon discovery of the same.

IV.

ADDITIONAL DISCLOSURE

Additional discovery will be provided to the State at the time any such information or discovery is acquired by the Defendant.

RESPECTFULLY SUBMITTED this 15th day of November, 2019.

STEVEN D. WEST
Attorney for Defendant

Copy of the foregoing
mailed/delivered this date to:

Lori Zucco
Deputy County Attorney
150 Quality Hill Road
Bisbee, Arizona 85603

11:29:27 11

EXHIBIT 2

That I guarantee. (laughing) Anyways the situation with why I'm sittin' at this table, something tell me things are not going to be going well for JD's family. It's the only reason I should be sittin' here because of Arizona Castle Doctrine.

DJ: What was the, the uh, you said that there was a, an incident at Burton's house. And then he said not here. What happened at the his house?

RW: I had gone to Robert's. It had to be almost 11:00 in the evening because at, from, I called my nephew at 10-0-2 at my house on Ramsey Road. My nephew was at my mother's house taking a shower. He had just got off work and he got off work late. I got a water heater for 51-13 because right now it has none, it's in the middle of a remodel. And he doesn't wanna live with his grandmother and I don't blame him. I don't wanna live with my mother either. Anyways, so he staying down there and I haven't gotten my fifth wheel moved up there. Anyways so I took a little water heater, I've already bought new cabinets with my brand name for JD and his kind of people's type of antics. I call them Five Dollar Gangsters. That's my brand that I have on JD's clan or Nikko's clan. Both of them can't help their situation. Lack of guidance if you ask me. But, however I named him is what I call 'em. Five Dollar Gangsters. The Five Dollar, um. Anyway Kale Parker, my nephew, last night had called me upset at midnight. 'Course nobody sitting outside my. They were up here and I was at Ramsey Road. And he called me upset. And he said I'm tired of these fuckin' tweekers. These tweekers are ---. I'll kill every fuckin' one of 'em ---. And he's locked and loaded. He's AR's and everything else up there. He, he's not gonna put up with it. He's already, he just got here from Missouri. He's a home owner too. I'm very proud of him and he works very hard every day. Not a drug addict. Nothin'. He's a good kid. And he's tough as nails. And he's got a ego big as Texas and he's gonna get himself hurt if he ain't careful 'cause he underestimates them. And in Missouri, he's held people for 45 minutes waitin' for the sheriff, at gunpoint, after he killed all their fuckin' dogs and everything. He is not afraid to use his weapon. Anyway, tonight when I was there, somebody walked in the yard and he walked out there with his AR-14. I guarantee you, you sheriffs need to do something about these Five Dollar Gangsters. And this includes Nikko Ochoa and whoever else he's with now. And this includes Jose, JD's dad. 'Cause my family's at risk, please. I understand that they're under federal investigation, and has been at least a year, because of Heidi Ochoa. And I know that she got shot because of the same bullshit. She was stealing from Steve. --- from Steve. I know Steve's not a thief, and I know he has to go through his trial. Nikko Ochoa did not have a choice --- Heidi's when he was a kid. Heidi and Steve got together some 13, 14 years ago and told him don't tell my kid what to do, instead of giving him guidance. My understanding is --- jail --- his trial. I was you gonna find this ---. I seen Nikko over there today and gave him a ride out of where his mother got shot just so he wouldn't be there. 'Cause he doesn't need to be there. He's an idiot. And he doesn't have anything, the only kind of school he has is steal. That's it. That's the only thing that kid does. ---, one part. It's just two days old, ok? ---

DB: So, can I ask you some'm here?

RW: Yes. We're getting to ---

DB: Uh, you said you were uh, I think you said Robert's at

RW: Yes, Robert Burton, yeah.

DB: 12:00 last night.

RW: No. Twelve o'clock last night I was at my house. My nephew and my mother were calling the cops at oh well, I keep forgetting this is this morning. Yes-, last night, night

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EXHIBIT 3

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LEGEND: 17-17769
ML: Michelle Lindsay

KD: Oh this is Ken D'Agostino, today's date is September 6th, 2019, it's about 1 o'clock, 1 pm, we're up here at the a San Car- or actually were in the CIU Unit of a the Perryville a Prison, we're here to do an interview regarding State vs. Roger Wilson that's CR 2-0-1-7-0-0-0-5-1-6 and we're gonna be interviewing Michelle Lindsay today and there are other folks who are gonna take part in the interview and I'll let them introduce themselves please

DB: Detective Borquez

LZ: Lori Zucco

SW: And Steven West

KD: Ok and Michelle could you state your name please

ML: Michelle Lindsay

KD: Ok uhm we're here to interview you about a case involving Roger Wilson

ML: Mhm

KD: Uhm you were interviewed by him at one point

ML: Mhm

KD: I believe, you recall that

ML: By Detective Borquez

KD: Yeah

ML: Yes

KD: Were you interviewed only that one time

ML: Mm I talked to him once at my house and then uhm that's it for that, he came here to talk to me about something else though

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've only been interviewed by County Attorney's office or the

ML: Uhm there was

KD: Cochise County Sheriff's on-

ML: There was somebody I believe it was for Roger's side

KD: Aha

ML: That came and talked to me about it too later on

KD: Ok was that Rod Rothrock

ML: I don't remember

KD: Ok

ML: It was a lady I know that

KD: Alright

SW: Oh

KD: A lady

ML: Mhm

KD: Ok hmm, uhm ok so we're gonna, let me ask you this, start off with some easy stuff. How long did you live in the uhm Sierra Vista uhm area

ML: Uhm I've been in Sierra Vista almost my whole life

KD: Ok born somewhere else but came

ML: No I uhm I was born in Sierra Vista and when I was about 11 or so I moved to Maryland for just like a year

KD: Ok and then came back to Sierra Vista

ML: Mhm

KD: So you have family in Sierra Vista

ML: Yes

KD: Ok uhm did you go to high school

ML: Mhm

KD: And did you complete high school

ML: No

KD: Ok which high school did you go to

ML: Uhm CAS was the last one I went to

KD: Ok uhm do you remember this event where Roger uhm had shot JD

ML: Yes

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2 ML: prior to that date uhm who did you know first, JD or Roger
3 JD
4 KD: Ok and how did you know JD
5 ML: Uhm his mom I actually knew first to begin with and then I had met JD just through
6 friends in the the area that we lived
7 KD: Ok uhm did you live in that same general area
8 ML: Mhm
9 KD: Ok uhm did you know other members of his family
10 ML: Uhm his mom, his dad, him and then later on I had met uhm his sister and his brother
11 KD: Ok did you have occasion to go over to their house and spend time or
12 ML: Uhm yeah before and after
13 KD: Ok so your pretty friendly with the family
14 ML: Mhm
15 KD: Ok uhm now my understanding is they moved to Sierra Vista from California, do you
16 know that
17 ML: Uhm I don't know, to be honest I thought it was from Douglas, but I might be wrong
18 KD: Oh ok could've been, alright did did you ever mention was there any ever men- any
19 mention of a street gang in in L.A. called uhm Eastside Torrence I think
20 ML: Not from them but I mean I've heard of that
21 KD: You've heard of that
22 ML: Yeah
23 KD: Ok but you didn't hear it through them talk about that or
24 ML: No
25 KD: Did you ever hear JD talk about it
26 ML: No
27 KD: Ok
28 ML: Not really
29 KD: Alright so uhm when did you meet Roger
30 ML: Uhm I met him not to long before the incident happened actually
31 KD: Ok
32 ML: I was going to uhm, he wanted me to help one of his friends by washing her dogs and I
would get paid for it

ML: So that's how I first met him

KD: And and ss- using the night that JD was shot, how how long before that happened was, was it weeks before or days before that you met him

ML: It was a couple weeks before that and then when the fight happened at a mutual friend's house that was like, I believe it was within the week or like a week before that, it wasn't very long

KD: Did you ever do the a the work for for uhm Roger

ML: No

KD: Ok, uhm why not

ML: He made me uncomfortable

KD: Ok a can you tell me more about that, why you felt that way

ML: Uhm well for one, I had heard stuff just from other people that he wasn't a good guy, that uhm he was more or less like just trying to get in my pants

KD: Ok

ML: And so I think that that kind of made me feel uncomfortable and then just, he was nice I guess, but I don't know, I just felt uncomfortable

KD: So did you hear that from other folks before you accepted that job and then you heard about that stuff and then

ML: Uhm no I had, I had gone with him to meet the lady and see the dogs and stuff and I told him yeah I can help you out and then uhm when I had gone back and I had told another friend about it and her brother was like look, just be careful you know he's not a very good guy, I've heard a lot of stuff about him, you know just trying to get into women's pants and then it just all bad

KD: Ok

ML: So I was like ok so I thought about it some more and he kept uhm calling and he came over to my house once to come and pick me up and honestly I didn't even go out there, I had my kids' father go out there and tell him look, I'm sorry, but she's not gonna do it

KD: Ok and the next time you see him, is it a mutual friend's home

ML: Yes

KD: Ok did you talk with him at any time between when you were gonna do the job and decided not to and then when you saw him at your friend's house

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went to my house and my kids' father told him I'm not gonna do it

KD: Ok

ML: I didn't talk to him anymore after that

KD: Ok

ML: He was pretty upset and it's understandable I said I was gonna do something and I didn't

KD: Ok uhm so you saw him at a mutual friend's home later on

ML: Mhm

KD: And which which fr-friend was that

ML: Mm his name is Brad

KD: A Brad Blumberg

ML: Mhm

KD: Ok tell me about that uhm how did you come to be at Brad's that day

ML: Uhm well honestly I used to use drugs and so we all would go and we'd hang out there

KD: Mhm

ML: And so uhm that's how I had first gotten to know him and went to his house and uhm I just went over there to hang out I guess and they were both there

KD: Ok uhm who was there when you got there

ML: First it was Roger and then JD showed up

KD: Ok when you got to Brad's house, was Brad there

ML: Yeah

KD: Ok

ML: He was there first

KD: And who else was there with Brad

ML: Uhm there was Roger and then one of his friends; I don't remember who it was I didn't know that person

KD: One of Roger's friends

ML: Yeah

KD: Ok so it was Brad, Roger and Roger's friend

ML: Mhm

KD: When you got to Brad's house

ML: Yes

KD: Ok uhm what were you doing when you got there

just hanging out

KD: Ok hanging out inside the trailer or out

ML: Mhm

KD: Ok and what's going on, what's everybody doing when you get there

ML: Uhm they were all just talking, I was a little bit uncomfortable because I felt bad for the situation with Roger

KD: Aha

ML: And uhm they were just kind of talking and I was just hanging out, kind a waiting for everybody to leave and then I was gonna hang out with Brad and then JD came and Brad was going, I think he was going outside or somewhere next door or something like that and then that's kind a when the altercation started to happen

KD: Ok so before JD gets there you guys are hanging out inside the trailer

ML: Mhm

KD: Ok and when JD arrives does he come in to the trailer or does he knock on the door, how do you know he arrives

ML: Uhm he just came in

KD: Came in

ML: Him and Brad were really close

KD: Ok uhm and what happened then, once JD gets there

ML: Uhm well at first they started talking and it was getting heated and Brad was like no you know, you guys aren't gonna do this here and so then it kind a quieted down and then as soon as Brad had gone outside uhm then JD just started talking to him

KD: Ok uhm so wh-when initially when they start talking, when JD and and Roger start talking what what are they talking about, what's their demeanor, what's going on

ML: Uhm Roger accused JD I guess uhm in the past of robbing his house and I don't remember all the details, it's been awhile but I know that JD was like I didn't do it, you know and Roger was dead set on it

KD: Mhm

ML: And JD wanted to talk about it you know and figure it out because Roger had been telling everybody that he had done it and uhm Roger said you know there's a time and a place for everything, like now's not it and so

KD: So Roger didn't want to discuss the issue at that time

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didn't want to discuss it

KD: And JD, JD wanted to

ML: Yeah JD wanted to clear the air and see why he was talking bad about him I guess and see why he was saying that

KD: Ok is this conversation going on inside the trailer

ML: Yes

KD: And you're you're

ML: I'm on the couch, very awkward because I didn't want to be in there for that

KD: Aha

ML: But I was kind a just stuck watching I guess

KD: Ok so Brad left

ML: Mhm

KD: And what about Roger's other fr-friend that was with him

ML: Uhm he was outside I believe

KD: So he, it's just, you, JD and Roger left in

ML: It's just yeah

KD: The trailer and

ML: Yeah

KD: JD's wanting to discuss

ML: Mhm

KD: This issue of Roger accusing him of stuff

ML: Yeah

KD: Ok uhm are they just talking, yelling, what's going on

ML: At first they were just talking and JD kept persuing it and kept trying to talk to him about it and it didn't seem like Roger wanted to do it, I don't know if it was just in front of me or if it was because he was trying not to do it in somebody's, in a friends house or what, but JD didn't want to let it go, he wanted to know why he was saying that

KD: Ok uhm are they both sitting down when this is, this conversations going on or are they

ML: Yeah

KD: Standing

ML: Uhm there was a couch right here and I'm on the couch and there was a stool right here and that's where Roger was and JD had sat in a chair that's right here

they're sittin' down and they're arguing back and forth

ML: Mhm

KD: About this and and what what happens then, what what's the next thing that happens

ML: Uhm it gets more heated, JD stood up and he went over to Roger, Roger stood up and tried backing away, he then, Roger did try and deflate the situation, he didn't want you know he didn't want to get into it right there

KD: Was was JD wanting to fight Roger at that point

ML: At first, he was just talking to him about it, but uhm Roger kept denying it and kind a doing the spin around and so it did anger JD and he was like, he ended up hitting him

KD: Ok

ML: More or less

KD: I'm trying to get a picture of wha- when JD stands up and approaches Roger and Roger stands up

ML: And backs away

KD: Does it look like they're squaring off to fight or did Roger, or that JD's gonna

ML: It looked like they were gonna fight yeah

KD: Ok

ML: Yeah

KD: So are they standing there with like fist balled or just

ML: Uhm to be honest I, I don't know it, I was just kind a just sitting back on the couch like wishing I wasn't in there, right there

KD: Aha

ML: And uhm I think at one point I even said like you guys should go outside cause it just freaked me out, its just a small area and I didn't, it just made me nervous

KD: And you're sittin' on the couch and they're standing in front of you basically

ML: Yeah there's a little uhm table in front of the couch so I mean that was between us, but that was it

KD: Mhm ok and just describe for me what you see happen while

ML: Uhm

KD: They're standing face to face

ML: Well they're arguing and the next thing I know JD punched Roger in the nose and he started bleeding

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[illegible] hand did JD hit Roger with

ML: I don't know, I don't know

KD: Ok, one of'em haha

ML: Yeah haa definitely

KD: It hit him one time

ML: Uhm yes

KD: Ok whaa- what did what a what was a Roger's reaction to that

ML: He was shocked uhm he held his nose it was bleeding ss- a lot, and uhm there was, when they're yelling was going on I guess Brad had heard that from outside or from wherever I don't know if he was on his way back or if he heard it and decided to come back, but he busted in and he was like what the fuck you know

KD: Aha

ML: And he told both of them to leave initially and JD was the only one that left and Roger stayed in there and was apologizing to him and he cleaned up his blood and he kind a hung around for a while even though we like just wanted everybody to leave kind of

KD: What, when JD socked Roger, did Roger go to the ground

ML: No

KD: Ok did he try to hit JD back

ML: No

KD: Uhm did he say anything

ML: Uhm it was a lot of heated I don't know exactly what he said while JD was there, but I know afterwards he was very talkative

KD: Ok uhm so Brad comes in

ML: Mhm

KD: Tells them they gotta leave

ML: Yeah

KD: JD does leave

ML: Yeah JD leaves

KD: Uhm and then Roger stays and he's cleaning up some of his blood that was on the floor, what is he saying

ML: Uhm he was saying first he told Brad that he was sorry, he tried not to do that and then he, he liked to call JD a five dollar gangster and so he said that he's old-school and you

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you know you don't do that, that there was a time and a place for everything and that wasn't it and that he's gonna get his

KD: He's gonna get his

ML: Mhm

KD: What did you understand that to mean

ML: Honestly I thought he was gonna try and jump him one of the times or something like I really didn't think he was gonna shoot him

KD: Aha uhm did anybody have a gun that day

ML: No not that I know of

KD: Ok uhm you didn't see one I guess

ML: No

KD: Yeah uhm so how long is Roger there at Brad's before he leaves

ML: Mm I can't say for sure, it felt like a long time but he finished cleaning, he was talking shit and then Brad just asked him to leave again

KD: Ok and when you say talking shit, it was

ML: Towards JD yeah

KD: What were you talk, what you mentioned just a little bit ago

ML: Mhm

KD: That he was gonna get him

ML: Yeah

KD: At some point, does he say anything different than that

ML: Uhm it was so long ago, all I really remember is that he specifically was calling him a five-dollar gangster and that he's old-school you don't mess with old-school

KD: Mhm

ML: And that he'll get his

KD: Ok

ML: But he was there for, it felt like a while so I mean he was just going on, he was pissed off so he was just venting you know

KD: Aha ok uhm did you see the wound, did he, on his face

ML: I saw the blood

KD: Ok

ML: Yeah I was honestly I was just trying to look down and like it was really awkward for me

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ML: So

KD: Didn't want to be in the middle of it

ML: Yeah yeah haa

KD: Did you actually see the punch or did you just were you just there and looked up and saw that he got hit

ML: Ahhh I don't know and to be honest I don't, I was watching, but I wasn't like I don't know, I know that he was bleeding so I know JD definitely punched him

KD: Ok

ML: And that's it really

KD: Do you remember if, Roger saying anything about JD having a weapon a something sharp

ML: I heard something about that, but JD did not have, he had earlier when I think he had first gotten there, he had had I don't know what it was, I think it was a piece of a fence or something, but it was in the chair, so I know that JD didn't stab him in the nose like he had said

KD: Well

ML: Cause that's what I heard later on

KD: Right, uhm back up a second, when did you see this object, when when JD came into the trailer

ML: Yeah I believe it was when he had came in, I don't quite remember but I remember him showing Brad and he was real amused with it like he got real amused by a little piece like that

KD: How how was he showing it to him, was he showing it to him like a weapon or was he just like holding up this you know this piece

ML: I don't remember he was just, I think just showing it to him like look at this, this is pretty cool you know

KD: Aha

ML: He he would get excited about little weird things like that

KD: And a uhm you said that later after they both had left

ML: Mhm

KD: That object was found in the chair that JD was sitting in

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ML: Yeah it was found in the side of the chair cause Brad had reached in there and had got'em

KD: Ok

ML: Haa

KD: Uhm ok so they're gone, when, when's the next time you see uhm JD

ML: Uhm I was at my other friends house the one who's brother had told me about Roger not being a good guy and uhm he came over trying to sell, I think it was like a checker set or something it was something really stupid you know and she was like no thanks and that was I believe the day right before he got shot

KD: Ok did you have a conversation with him at all

ML: No I just kind of laughed at him, I'm like you're a dork, like who's gonna, why are you going door to door trying to sell a checker set

KD: And you think that was maybe the day before he was shot

ML: Yeah

KD: Uhm did you see Roger after he'd left Brad's house

ML: Uhm I don't think I did, I can't remember

KD: Cause you pro- you do ever remember see him ever again I guess, after he left Roger's or Brad's

ML: Yeah, no and the next thing that I heard was yeah

KD: Ok uhm tell me a little more about JD and his reputation. What, what kind of guy was he, what was he into

ML: Uhm his reputation wasn't great, he he wore baggy pants, he wanted to be a gangster. I think his thing that he wanted to be buried in was a zoot suit, so that kind of said it all haa

KD: Huh

ML: He was all about that

KD: Did he have like tatts like gang tattoos or

ML: Mm no I don't think he had gang tattoos, I can't remember, but he did have tattoos

KD: And when he spoke of gang life did he profess to be any particular part of any

ML: No he just

KD: Particular gang

ML: It was, it was kind of funny cause like he would try really hard, but he did have a really sweet heart so it was like you're not fooling anybody but you look like you could be

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gangster, but you're not haa

KD: You knew him pretty well

ML: Well I mean kind of, like I said I knew his mom first

KD: Yeah

ML: And JD did have kind of a reputation as --- trying to be a gangster haa

KD: And trying to be in a gangster to me means either like sell drugs or or do violent acts

ML: No the way that he dressed and the way that he talked, that's how I mean it by

KD: Uhm what's his reputation as far as being a fighter or a guy that gets into confrontations, do you know anything about that

ML: Mm not really uhm I know that he was kind of a hot head and he'd go off on some stupid stuff you know, but I mean I never saw it first hand, I saw him go off and he would just talk shit but it wasn't, I'd never seen him like pick a fight with anybody that was the first time

KD: Ok did you ever hear that he was kind of like that, that he would like to fight

ML: Mhm(no)

KD: Ok uhm I have the impression that pretty much everybody in this group was using drugs at that time, is that fair to say

ML: Yeah

KD: Ok uhnm how about JD can you tell me a little bit about his drug use, what was he doing at that time

ML: The same as all of us, we smoked meth uhm he liked to drink

KD: Ok

ML: And that's about it.

KD: Alcohol and meth were his choice, drugs of choice

ML: Mm I think so I seen him, you know I smoked meth with him more times than I've seen him drunk

KD: Ok

ML: I hadn't really seen him drunk a whole lot but I know he liked to get drunk, but then again I mean I did too

KD: Right

ML: Like that was just kind of the thing

KD: So you were with him when he drank

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ML: I mean yeah, we've gone to mutual friends house and stuff, I never gone over to his house like to hang out with him specifically

KD: Aha

ML: But I mean I know that you know he drank, he'd drink beers and stuff

KD: How does he behave when he's drunk or when he's drinking

ML: More enthusiastic haa than what he is, he's uhm kind of annoying sometimes haa he makes some really weird sounds, I think that's just the meth and the alcohol together like he was amusing we can say that haa

KD: Aha, does he get more aggressive when he drinks

ML: Uhm I've never seen it

KD: Ok uhm how about Roger, did you ever use any drugs with Roger

ML: I smoked meth with him

KD: And when would that have been

ML: When I had gone over to meet the lady and her dogs

KD: Ok on that day you did with him

ML: Mhm

KD: Ok

ML: Yeah

KD: And

ML: We went to his uhm trailer first and we smoked and then we went over to that lady's house and then he took me home

KD: Ok uhm did you ever drink alcohol with Roger

ML: No

KD: Ok

ML: But I heard he was a really big drinker but I I didn't see it

KD: Alright uhm what about uhm JD's reputation as far as being a thief. Did you ever hear anything about that

ML: I heard that, but in honestly in the neighborhood that I was in, everybody seemed to have that reputation

KD: Everybody stole from everybody else or

ML: More or less yes

KD: So is it fair did, you had heard that about Ro- uhm a fro- about JD

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ML: I heard it about JD, I've heard it fro- about me, you know we were all just not in a good situation. We were getting hi, drinking like it was just

KD: And that was the way the subsidize

ML: Usually meth heads have the reputation of being thieves

KD: Alright

ML: So I don't know if it was just that reputation you know or if it was that he actually did it

KD: You mentioned earlier that you came o- you saw him after Brad's and he was selling a checker set

ML: Yeah

KD: Did he try to sell you stuff before or was that the first time you'd ever seen him try to sell something

ML: Uhm that was definitely the first time he ever had gone to my friend's house and she was pissed cause she's was like I don't want that shit over here you know and but other than that I mean no

KD: When you say that shit did it's like cause it it's stolen goods or what

ML: That's what she assumed but she also uhm she was one of the ones that thought that he was just a neighborhood thug, a thief you know but then she had the same reputation haa so technically you know like who who are we to talk shit about somebody else when everybody thinks that you know it's all of us

KD: Right ok, uhm did you have a chance to look at your interview before we

ML: Uhm

KD: You did with Mr. or Detective Borquez

ML: I went over the first page and I got to like right there and then that was it and then it was time start

KD: Ok uhm I don't think I have any other questions, do you

SW: I got a couple a you mentioned in your statement a lady named Lona

ML: Mhm

SW: What where does she fit it, what where, wasn't she at Brad's house

ML: Uhm I think she came later, I can't remember, I know that she wasn't there for the fight

SW: Ok

ML: Uhm but that was who, when I said he had came by trying to sell a checker set, that was the friend that, that I was at. It was her brother that had told me about Roger

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SW: Ok so what's Lona's last name

ML: Mm Hardy

SW: Lona Hardy, ok and then had you ever heard any uhm anybody talking about a JD using or having a gun

ML: Mhm(no)

SW: Never

ML: Mhm(no)

SW: Ok and and can you say no for the record,

ML: Oh, no

SW: Shaking your head doesn't record well haa

ML: Sorry, no haa

SW: That's quite alright thank you uhm that was the only questions I had thanks

KD: You guys

LZ: No I don't have any

KD: Alright, thank you

ML: Thank you

LZ: She looks so

End of Transcript

Transcribed By: Luisa Valencia

Date: 10/5/2019

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That I guarantee. (laughing) Anyways the situation with why I'm sittin' at this table, something tell me things are not going to be going well for JD's family. It's the only reason I should be sittin' here because of Arizona Castle Doctrine.

DJ: What was the, the uh, you said that there was a, an incident at Burton's house. And then he said not here. What happened at the his house?

RW: I had gone to Robert's. It had to be almost 11:00 in the evening because at, from, I called my nephew at 10-0-2 at my house on Ramsey Road. My nephew was at my mother's house taking a shower. He had just got off work and he got off work late. I got a water heater for 51-13 because right now it has none, it's in the middle of a remodel. And he doesn't wanna live with his grandmother and I don't blame him. I don't wanna live with my mother either. Anyways, so he staying down there and I haven't gotten my fifth wheel moved up there. Anyways so I took a little water heater, I've already bought new cabinets with my brand name for JD and his kind of people's type of antics. I call them Five Dollar Gangsters. That's my brand that I have on JD's clan or Nikko's clan. Both of them can't help their situation. Lack of guidance if you ask me. But, however I named him is what I call 'em. Five Dollar Gangsters. The Five Dollar, um. Anyway Kale Parker, my nephew, last night had called me upset at midnight. 'Course nobody sitting outside my. They were up here and I was at Ramsey Road. And he called me upset. And he said I'm tired of these fuckin' tweekers. These tweekers are ---. I'll kill every fuckin' one of 'em ---. And he's locked and loaded. He's AR's and everything else up there. He, he's not gonna put up with it. He's already, he just got here from Missouri. He's a home owner too. I'm very proud of him and he works very hard every day. Not a drug addict. Nothin'. He's a good kid. And he's tough as nails. And he's got a ego big as Texas and he's gonna get himself hurt if he ain't careful 'cause he underestimates them. And in Missouri, he's held people for 45 minutes waitin' for the sheriff, at gunpoint, after he killed all their fuckin' dogs and everything. He is not afraid to use his weapon. Anyway, tonight when I was there, somebody walked in the yard and he walked out there with his AR-14. I guarantee you, you sheriffs need to do something about these Five Dollar Gangsters. And this includes Nikko Ochoa and whoever else he's with now. And this includes Jose, JD's dad. 'Cause my family's at risk, please. I understand that they're under federal investigation, and has been at least a year, because of Heidi Ochoa. And I know that she got shot because of the same bullshit. She was stealing from Steve. --- from Steve. I know Steve's not a thief, and I know he has to go through his trial. Nikko Ochoa did not have a choice --- Heidi's when he was a kid. Heidi and Steve got together some 13, 14 years ago and told him don't tell my kid what to do, instead of giving him guidance. My understanding is --- jail --- his trial. I was you gonna find this ---. I seen Nikko over there today and gave him a ride out of where his mother got shot just so he wouldn't be there. 'Cause he doesn't need to be there. He's an idiot. And he doesn't have anything, the only kind of school he has is steal. That's it. That's the only thing that kid does. ---, one part. It's just two days old, ok? ---

DB: So, can I ask you some'm here?

RW: Yes. We're getting to ---

DB: Uh, you said you were uh, I think you said Robert's at

RW: Yes, Robert Burton, yeah.

DB: 12:00 last night.

RW: No. Twelve o'clock last night I was at my house. My nephew and my mother were calling the cops at oh well, I keep forgetting this is this morning. Yes-, last night, night

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EXHIBIT 4

2017 WL 1323354
Only the Westlaw citation is currently available.
THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. NOT FOR PUBLICATION *See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.
Court of Appeals of Arizona, Division 2.

The STATE of Arizona, Appellee,

v.

Michael Dwayne LEDAY Jr., Appellant.

No. 2 CA–CR 2015–0478

Filed April 10, 2017

Review Denied December 19, 2017

Appeal from the Superior Court in Pima County, No. CR20140376001, The Honorable Richard D. Nichols, Judge
AFFIRMED AS CORRECTED

Attorneys and Law Firms

Mark Brnovich, Arizona Attorney General, Joseph T. Maziarz, Chief Counsel, Phoenix, By Tanja K. Kelly, Assistant Attorney General, Tucson, Counsel for Appellee

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Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

MEMORANDUM DECISION

MILLER, Judge:

***1** ¶ 1 After a jury trial, Michael Leday was convicted of two counts of second-degree murder, one count of aggravated assault causing serious physical injury, and one count of aggravated assault with a dangerous instrument. He was sentenced to concurrent and consecutive terms totaling 57.5 years. He argues the trial court erred by denying his motion for a change of venue, denying his request for a self-defense justification instruction, making certain evidentiary rulings, and improperly aggravating his sentence. We affirm for the reasons stated below.

Factual and Procedural Background

¶ 2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Delahanty*, 226 Ariz. 502, n.2, 250 P.3d 1131, 1133 n.2 (2011). At about 3:00 A.M. on New Year's Day 2014, Leday and C.B. got out of a taxicab in a residential area of Tucson. Witnesses at a nearby party saw Leday take off C.B.'s clothing, climb on top of her, and attempt to have sex with her in the middle of the street, even as she screamed for him to stop. A car stopped nearby; P.B., the driver, called the police [1] and stepped out of the car [2] while on the telephone. Leday told P.B. "that if he want[ed] [C.B.], he [could] take her, that he[was] no use to her anymore." Leday walked around toward the driver's-side door of the car. P.B. told Leday to back off and not get too close. Leday then punched P.B. and a fistfight ensued between them. Multiple witnesses said Leday was the initial aggressor and P.B. was "defending himself." P.B. tried to back away from the fight at one point but Leday "[f]ollow[ed] him" and kept swinging at him.

¶ 3 Leday forced his way into the driver's seat of the car. He honked the horn and revved the engine multiple times, and then drove forward, running over C.B.'s legs as she lay in the street. He put the car in reverse, backed up, put it in drive again, and ran over C.B. "back and forth." He continued into a wash and hit a tree, and then backed up and came back toward the street. P.B. positioned himself between the car and C.B. Then Leday accelerated and ran over P.B., dragging him. At some point, Leday got out of the car, punched P.B., and said, "[D]o you want to be a hero[?]" Leday drove away in the car, about thirty seconds or a minute passed, and then he returned and ran over C.B. again. Finally, he came to a stop, got out of the car, screamed "Oh my God, oh my God, what did I do, call the cops," and left.

¶ 4 Altogether, Leday ran over C.B. about five times, and ran over P.B. three times. C.B. died at the scene, and P.B. died later; a forensic pathologist opined both deaths were caused by blunt-force injuries sustained as the result of being run over by a vehicle. Leday also ran over V.C. at some point during the incident, causing serious injuries which she survived. DNA [3] matching that of P.B. and C.B. was found on the undercarriage of the car. [4] DNA matching Leday's was found in the center of the car's deployed driver's-side airbag, on the

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windshield at the site of impact, and on the interior handle of the driver's-side door. The car's electronic data system showed that the vehicle had been going seventy-eight miles per hour five seconds before the airbag had deployed, and that the accelerator was pressed to one hundred percent capacity at the moment of the impact that had caused the airbag to deploy.

*2 ¶ 5 Leday took a bus to Missouri the day after the incident and was eventually apprehended in Kansas City after a foot chase with law enforcement officers there. He spontaneously commented to a Missouri detective: "I'm going to get the death penalty for this shit."

¶ 6 After a jury trial, Leday was convicted of second-degree murder of P.B. and C.B., aggravated assault with a dangerous instrument of V.C., and aggravated assault causing serious physical injury of V.C. [5] We have jurisdiction over his appeal pursuant to A.R.S. §§ 13–4031 and 13–4033(A)(1).

Motion for Change of Venue

¶ 7 Leday argues the trial court erred by denying his motion for a change of venue based on pretrial publicity pursuant to Rule 10.3, Ariz. R. Crim. P. "A party seeking a change of venue must show that the prejudicial pretrial publicity 'will probably ... deprive[ ] [the party] of a fair trial.' " *State v. Cruz*, 218 Ariz. 149, ¶ 12, 181 P.3d 196, 203 (2008), *quoting* Ariz. R. Crim. P. 10.3(b) (alterations in *Cruz*). We review a ruling on a motion for a change of venue for an abuse of discretion. *State v. Forde*, 233 Ariz. 543, ¶ 11, 315 P.3d 1200, 1210 (2014).

¶ 8 A reviewing court employs a two-step inquiry to decide "whether, under the totality of the circumstances, the publicity attendant to defendant's trial was so pervasive that it caused the proceedings to be fundamentally unfair." *Id.* ¶ 12, *quoting Cruz*, 218 Ariz. 149, ¶ 13, 181 P.3d at 203. First, the court will ask "whether the publicity so pervaded the proceedings that the trial court erred by not presuming prejudice." *Id.* If prejudice is not presumed, the court determines "whether the defendant showed actual prejudice." *Id.*

¶ 9 The defendant's burden of showing presumptive prejudice from pretrial publicity is "extremely heavy." *Id.* ¶ 13, *quoting State v. Bible*, 175 Ariz. 549, 564, 858 P.2d 1152, 1167 (1993). "The publicity must be so unfair, prejudicial, and pervasive that jurors could not decide the case fairly, even if they avow otherwise." *Id.*; *see also State v. Bigger*, 227 Ariz. 196, ¶ 10, 254 P.3d 1142, 1146 (App. 2011), *quoting Cruz*, 218 Ariz. 149, ¶ 15, 181 P.3d at 204 (pretrial coverage "must be so 'extensive or outrageous that it permeated the proceedings or created a "carnival-like" atmosphere' "). Courts will consider not only the quantity but also the effect of pretrial publicity, and are reluctant to presume prejudice when the publicity was "primarily factual and non-inflammatory" or "did not occur close in time to the trial." *Bigger*, 227 Ariz. 196, ¶ 11, 254 P.3d at 1146, *quoting State v. Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d 717, 727 (2001).

¶ 10 Leday has not carried the extremely heavy burden of showing presumptive prejudice. The news articles he attached to his motion for a change of venue were largely factual in nature, and all were published more than a year before the beginning of trial. *Cf. Forde*, 233 Ariz. 543, ¶ 14, 315 P.3d at 1211 (no presumed prejudice where most news accounts "essentially factual" and published in immediate aftermath of crimes, about eighteen months before trial). The coverage primarily discussed the crime itself, Leday's apprehension and extradition, and the effects of the crime on the victims and their families. One article quoted a police spokesperson as saying that Leday had "aggressively used [P.B.'s] vehicle as a weapon to strike all three victims multiple times," but indeed this was the state's theory of the case as to the first-degree murder and attempted first-degree murder counts, and it was essentially factual with the possible exception of the word "aggressively." Leday also emphasizes that numerous articles included characterizations of him as a "monster" or characterizations of P.B. as a "hero," "good Samaritan," "gentleman," or "stand-up guy," but most of these characterizations were merely quotes from P.B.'s loved ones. Such characterizations are neither surprising nor inflammatory coming from those who had lost a loved one in a tragic incident.

*3 ¶ 11 The pretrial coverage in this case was not nearly as inflammatory as that in *Bible*, in which certain news reports incorrectly stated the defendant was a child molester, had " 'flunked' a lie detector test" in connection to the case, and had admitted involvement in the charged offenses. 175 Ariz. at 564, 858 P.2d at 1167. Even on those facts, our supreme court declined to presume prejudice, observing that the record did not show the coverage had "utterly corrupted" the trial. *Id.* at 564–65, 858 P.2d at 1167–68, *quoting Murphy v. Florida*, 421 U.S. 794, 798 (1975). As in *Bible*, here the trial court did not abuse its discretion in determining Leday did not establish that the coverage was so outrageous as to foreclose the possibility of a fair trial.

¶ 12 Leday also argues reader comments posted on the internet website versions of some of the news articles support his claim of presumptive prejudice. Although we agree some of the comments were inflammatory, "[a] smattering of online comments found on news stories hardly substantiates a finding of community prejudice in a large community such as [Tucson]." *State v. Griego*, 377 P.3d 1217, ¶ 34 (Mont. 2016); *accord Powell v. State*, 49 A.3d 1090, 1098 (Del. 2012) (inflammatory online comments deserved only minimal weight in presumptive prejudice analysis). To the extent the comments created the potential for actual prejudice among jurors, "the best method to uncover [such] potential prejudice is through the voir dire process," which here revealed no prejudice, as discussed below. *Griego*, 377 P.3d 1217, ¶ 34.

¶ 13 Nor has Leday shown actual prejudice. "For a court to find actual prejudice, jurors must have formed preconceived notions of guilt they were unable to set aside." *Bigger*, 227 Ariz. 196, ¶ 20, 254 P.3d at 1148; *see also Cruz*, 218 Ariz. 149, ¶ 21, 181 P.3d at 204 (dispositive question is what effect publicity had on objectivity of jurors actually seated). Here, of the jurors actually seated, just three had seen any media reports related to the case. One affirmed she could approach the case with an open mind notwithstanding the news reports she had seen; another said he did not know any details about the case and that it only "r[ang] a vague bell." The third, who also affirmed during voir dire that she could approach the trial with an open mind, was later randomly selected as an alternate juror and did not actually participate in the deliberations. The record reveals no actual prejudice to Leday from the pretrial publicity. *See Bigger*, 227 Ariz. 196, ¶¶ 20–22, 254 P.3d at 1148–49 (no actual prejudice where most jurors had "only vague recollections" of media coverage and none had formed opinion as to defendant's guilt or innocence). The court did not abuse its discretion in denying Leday's motion for a change of venue.

Justification Instruction

¶ 14 Leday's next assignment of error is the trial court's refusal to give the self-defense justification instruction he requested as to the counts involving P.B. and V.C.[6] "A defendant is entitled to a self-defense instruction if the record contains the 'slightest evidence' that he acted in self-defense." *State v. King*, 225 Ariz. 87, ¶ 14, 235 P.3d 240, 243 (2010), *quoting State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983); *see also id.* ¶ 15 ("hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing her life or sustaining great bodily harm," constitutes "slightest evidence"), *quoting Lujan*, 136 Ariz. at 104, 664 P.2d at 648. Yet the instruction is not required "unless it is reasonably and clearly supported by the evidence." *State v. Vassell*, 238 Ariz. 281, ¶ 9, 359 P.3d 1025, 1028 (App. 2015), *quoting State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692–93 (App. 2005). We review the court's ruling for a clear abuse of discretion, viewing the facts in the light most favorable to Leday, the instruction's proponent. *Vassell*, 238 Ariz. 281, ¶¶ 2, 8, 359 P.3d at 1026, 1027–28.

*4 ¶ 15 "A person is justified in ... using deadly physical force against another ... [w]hen and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13–405(A)(2). "An essential element of self-defense is the accused's freedom from fault in provoking the difficulty that gives rise to the use of the force." *State v. Zamora*, 140 Ariz. 338, 341, 681 P.2d 921, 924 (App. 1984); *see* A.R.S. § 13–404(B)(3). Furthermore, "after a fight has broken off, one cannot pursue and kill merely because he once feared for his life." *State v. Buggs*, 167 Ariz. 333, 337, 806 P.2d 1381, 1385 (App. 1990), *citing State v. Powers*, 117 Ariz. 220, 227, 571 P.2d 1016, 1023 (1977); *cf. State v. Barger*, 167 Ariz. 563, 567–68, 810 P.2d 191, 195–96 (App. 1990) (approving instruction that stated "The right to use physical force in self-defense ends when the apparent danger ends.").

¶ 16 There was not the slightest evidence Leday used deadly physical force in self-defense against V.C.'s use of deadly physical force. There was no evidence V.C. used or attempted to use physical force against Leday at all, much less unlawful deadly physical force. § 13–405(A)(2). Absent any evidence of a "hostile demonstration" by V.C., *King*, 225 Ariz. 87, ¶ 15, 235 P.3d at 243, *quoting Lujan*, 136 Ariz. at 104, 664 P.2d at 648, the record did not reasonably and clearly support a justification theory as to her and a justification instruction was not required, *Vassell*, 238 Ariz. 281, ¶ 9, 359 P.3d at 1028.

¶ 17 Nor did the record support a justification instruction as to P.B. All but one eyewitness to the fight testified Leday threw the first punch, even after P.B. had told him to back off and not get too close. The one witness who did not so testify, stated he did not know who had thrown the first punch, but agreed Leday had been the initial aggressor. No witnesses claimed P.B. had initiated the physical confrontation. *See* § 13–404(B)

(3) (use of physical force by initial aggressor not justified absent his withdrawal).

¶ 18 But even assuming arguendo that, in the light most favorable to Leday, the evidence showed P.B. had been the initial aggressor and Leday was justified in using physical force in self-defense against P.B.'s initial punch, Leday was not justified in following P.B. and continuing to swing at him after P.B. had attempted to back away from the fight. *See Buggs*, 167 Ariz. at 337, 806 P.2d at 1385. Nor was Leday justified in using deadly physical force against P.B. (or V.C.) after the alleged danger had ended and Leday had found safety inside the car. *See Barger*, 167 Ariz. at 567–68, 810 P.2d at 195–96; *see also* § 13–405 (deadly physical force must be "immediately necessary" to be justified). The trial court did not abuse its discretion in refusing Leday's request for a justification instruction. *Vassell*, 238 Ariz. 281, ¶ 9, 359 P.3d at 1028.

Evidentiary Issues

Admission of Defendant's Pretrial Statement

¶ 19 Leday argues the trial court abused its discretion by admitting his statement to the Missouri detective that he was "going to get the death penalty for this shit." At trial, he sought to preclude the statement on relevance grounds, but on appeal he argues it was inadmissible pursuant to Rule 403, Ariz. R. Evid. As he acknowledges, our review is limited to fundamental, prejudicial error. *See generally State v. Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d 601, 607–08 (2005). It is Leday's burden to show an error that went to the foundation of the case, took from him a right essential to his defense, and was of such magnitude that he could not possibly have received a fair trial. *Id.*

***5** ¶ 20 Evidence is relevant if it has any tendency to make any fact of consequence more or less probable than it would be without the evidence. Ariz. R. Evid. 401. Irrelevant evidence is inadmissible. Ariz. R. Evid. 402. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or needlessly presenting cumulative evidence, among other risks. Ariz. R. Evid. 403. "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Ortiz*, 238 Ariz. 329, ¶ 9, 360 P.3d 125, 130 (App. 2015), *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶ 21 The trial court reasonably concluded Leday's statement was relevant to show consciousness of guilt. *Cf. State v. Updike*, 151 Ariz. 433, 433–34, 728 P.2d 303, 303–04 (App. 1986) (defendant's statement "keep your mouth shut and nobody will get in trouble" relevant to show consciousness of guilt). However, Leday argues its probative value was substantially outweighed by the risk of needlessly presenting cumulative evidence, because Leday's flight to and within Missouri and his statement "Oh my God, oh my God, what did I do, call the cops" had already established consciousness of guilt. In the alternative, he argues the probative value was substantially outweighed by the risk of unfair prejudice because the reference to the death penalty, an emotionally charged issue, suggested decision on the basis of emotion or horror.

¶ 22 Leday has not established that admission of his statement went to the foundation of the case, deprived him of a right essential to his defense, and deprived him of a fair trial. *Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d at 607–08. Furthermore, even assuming for the sake of argument that the statement was inadmissible pursuant to Rule 403, he has failed to show prejudice. *See id.* ¶ 20 (defendant's burden to show prejudice in fundamental error review). The jury was instructed not to consider possible punishment—such as the death penalty—in reaching its verdict, and we presume the jurors followed that instruction. *State v. Newell*, 212 Ariz. 389, ¶¶ 68–69, 132 P.3d 833, 847 (2006). The verdict also suggests the evidence did not inflame the jury—the jury found Leday not guilty of first-degree murder of P.B. and C.B. and instead convicted him of second-degree murder on those counts. It also found Leday not guilty on the charge of attempted first-degree murder, as well as its lesser-included offense of attempted second-degree murder, as to V.C. *Cf. State v. Bocharski*, 200 Ariz. 50, ¶ 34, 22 P.3d 43, 50 (2001) (attention to detail in verdict and conviction for lesser-included offenses may suggest verdict not based on outrage). Thus, had any error occurred, it would be neither fundamental nor prejudicial.

Preclusion of Victim's Prior Conviction

¶ 23 Leday contends the trial court erred by denying his pretrial motion to allow admission of evidence regarding P.B.'s conviction for a 2005 drive-by shooting at a strip club pursuant to Rules 404 and 405, Ariz. R. Evid. We review evidentiary rulings for an abuse of discretion. *State v. Steinle*, 239 Ariz. 415, ¶ 6, 372 P.3d 939, 941 (2016).

¶ 24 "Evidence of a pertinent trait of character of the victim of the crime offered by an accused" is admissible to prove action in conformity therewith. Ariz. R. Evid. 404(a)(2). Such evidence may be in the form of reputation or opinion testimony. Ariz. R. Evid. 405(a). Rule 404(b) provides, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, a person's character trait that is "an essential element of a charge, claim, or defense" may be proved by "relevant specific instances of the person's conduct." Ariz. R. Evid. 405(b).

*6 ¶ 25 A victim's character is not an element a party must prove to make out a prima facie case of self-defense; therefore, it is not an "essential element" of self-defense under Rule 405(b). *State v. Fish*, 222 Ariz. 109, ¶¶ 29–30, 213 P.3d 258, 268 (App. 2009). When a defendant offers evidence of the victim's aggressive or violent character to show that the victim was the initial aggressor, it is admissible only if it is in the form of reputation or opinion, not if it is in the form of a specific instance of violence or aggression by the victim which was not known to the defendant at the time of the alleged crime. [7] *See id.* ¶¶ 25–35. There was no evidence that Leday knew of P.B.'s prior conviction before committing the alleged crimes. And Leday offered the conviction as a specific instance of conduct to prove P.B.'s violent character and conformity therewith on the night in question. Thus, the trial court did not abuse its discretion in excluding the evidence under Rules 404(a)(2) and 405(a)–(b). *Fish*, 222 Ariz. 109, ¶ 35, 213 P.3d at 270.

¶ 26 Leday further argues the conduct that gave rise to P.B.'s prior conviction was so similar to his alleged conduct on the night in question that evidence about the 2005 incident was admissible to show P.B. had a modus operandi in such situations. *See* Ariz. R. Evid. 404(b); *cf. Fish*, 222 Ariz. 109, ¶¶ 41–49, 213 P.3d at 271–74. In the 2005 incident, P.B. was kicked out of a strip club after a dispute with his ex-girlfriend who was a dancer there, after which he shot at the bouncer of the club. In the present incident, P.B. stopped his car and called 9–1–1 to report a man on the street "abusing" or attempting to rape a woman, and a fistfight ensued. The trial court did not err in finding these two incidents "factually dissimilar," and thus, the 2005 incident had minimal probative value in terms of showing P.B.'s purported modus operandi. And the court implicitly and reasonably concluded that the danger of unfair prejudice from evidence that P.B. had committed drive-by shooting at a strip club was high. Thus, even assuming for the sake of argument that Rule 404(b) applied as it did under the unique facts of *Fish*, *see* 222 Ariz. 109, ¶ 49, 213 P.3d at 274, the evidence was still inadmissible pursuant to Rule 403, *see Fish*, 222 Ariz. 109, ¶¶ 50–54, 213 P.3d at 274–75. [8]

Sentencing Issues

¶ 27 Leday contends the trial court erred by aggravating his sentences on Counts One and Two. We review a sentence within the statutorily-prescribed range for an abuse of discretion, but determine de novo whether the court may use a particular factor in aggravation. *State v. Tschilar*, 200 Ariz. 427, ¶ 32, 27 P.3d 331, 339 (App. 2001). We interpret sentencing statutes de novo. *State v. Urquidez*, 213 Ariz. 50, ¶ 11, 138 P.3d 1177, 1180 (App. 2006).

¶ 28 Counts One and Two of the indictment charged Leday with first-degree murder of P.B. and C.B., respectively. Before trial, the state alleged each count of the indictment was of a dangerous nature in that each involved a deadly weapon or dangerous instrument—a motor vehicle. The state later filed a notice of intent to prove two aggravating factors: (1) the especially cruel, heinous, or depraved manner in which the offenses were committed, and (2) physical, emotional, or financial harm to V.C. and to the families of P.B. and C.B. *See* A.R.S. § 13–701(D)(5), (9).

*7 ¶ 29 The jury found Leday guilty of the lesser-included offense of second-degree murder on Counts One and Two. At the aggravation hearing, the state withdrew its allegation of harm to C.B.'s family, and abandoned its allegation the crimes had been committed in an especially cruel, heinous, or depraved manner by not objecting when that issue was not submitted to the jury. The jury found beyond a reasonable doubt that Counts One and Two involved the use of a dangerous instrument. The jury found the Count One aggravating factor of emotional or financial harm to P.B.'s family not proven beyond a reasonable doubt.

¶ 30 At the sentencing hearing, the trial court found three aggravating factors as to Counts One and Two: (1) the dangerous nature of the offenses which were committed with a dangerous instrument, namely, a motor vehicle, (2) the emotional harm Leday caused V.C. and the families of P.B. and C.B., and (3) Leday's lack of remorse as evidenced by his

escape from Tucson and attempted escape in Missouri. The court imposed the maximum sentence of twenty-five years on Counts One and Two pursuant to A.R.S. § 13–710(A).

¶ 31 Leday argues the jury did not find any aggravating factor as to Counts One and Two because the state failed to prove harm to P.B.'s family beyond a reasonable doubt, withdrew the allegation of harm to C.B.'s family, and abandoned its claim that the crimes were committed in a cruel, heinous, or depraved manner. Therefore, he contends, the trial court erred by aggravating the sentence based only on the aggravating factors it found at the sentencing hearing. He cites *Apprendi v. New Jersey*, in which the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000); *accord Blakely v. Washington*, 542 U.S. 296, 303–04 (2004); *see also State v. Brown*, 209 Ariz. 200, ¶¶ 12–13, 99 P.3d 15, 18 (2004) (in Arizona, absent jury findings, presumptive sentence is "statutory maximum" within meaning of *Apprendi*).

¶ 32 The state contends the jury did find one aggravating factor as to Counts One and Two—the use of a dangerous instrument, a motor vehicle. *See* A.R.S. § 13–701(D)(2). Leday maintains the jury only found the dangerous-instrument sentence enhancement pursuant to A.R.S. §§ 13–105(13) and 13–704, not the dangerous-instrument aggravating factor under § 13–701(D)(2).

¶ 33 Section 13–701(D)(2) provides "the trier of fact shall determine and the court shall consider" as an aggravating circumstance the "[u]se, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under § 13–704." Use, threatened use, or possession of a deadly weapon or dangerous instrument is not an essential element of second-degree murder. *See* A.R.S. § 13–1104(A) (crime may be completed without any deadly weapon or dangerous instrument). Nor was the use of a deadly weapon or dangerous instrument used to enhance Leday's sentence on Counts One and Two under § 13–704 because he was sentenced for those counts under § 13–710, not § 13–704. Thus, the jury properly considered the dangerous-instrument aggravating circumstance under § 13–701(D)(2), and found it proven beyond a reasonable doubt as to Counts One and Two.

¶ 34 Under Arizona's noncapital sentencing law, once the jury has found at least one aggravating circumstance beyond a reasonable doubt, the court may consider other factors relevant to the exercise of its discretion in determining the specific sentence to impose on the defendant within the applicable statutory sentencing range. A.R.S. § 13–701(F); *State v. Martinez*, 210 Ariz. 578, ¶ 16, 115 P.3d 618, 623 (2005). The court may find such facts by a preponderance of the evidence without violating the Sixth Amendment principles articulated in *Apprendi* and *Blakely*. *Martinez*, 210 Ariz. 578, ¶¶ 26–27, 115 P.3d at 625–26; *see* A.R.S. § 13–701(F); *see also United States v. Watts*, 519 U.S. 148, 156–57 (1997) (jury's verdict of acquittal does not prevent sentencing court from finding conduct underlying acquitted charge proven by preponderance of evidence). [9]

***8** ¶ 35 The jury found beyond a reasonable doubt that Counts One and Two involved the use of a dangerous instrument. This *Blakely*-compliant, jury-determined, aggravating circumstance "establishe[d] the facts legally essential to expose the defendant to the maximum sentence" prescribed in the applicable sentencing statute, § 13–710(A). *Martinez*, 210 Ariz. 578, ¶ 21, 115 P.3d at 624. Later, at the sentencing hearing, the trial court found the three aggravating factors noted above, and considered them in the course of determining the appropriate sentence within the § 13–710(A) range. The court did not abuse its discretion in imposing maximum sentences on Counts One and Two.

¶ 36 In the alternative, Leday argues he did not receive adequate notice of the state's intent to prove use of a dangerous instrument as an aggravating circumstance, but only as an enhancer, and contends using that circumstance as an aggravator was "fundamentally unfair." He maintains the state's allegation, filed on the same date as the indictment, that all counts and any lesser-included offenses involved "use and/or discharge and/or threatening exhibition of a deadly weapon and/or dangerous instrument, to wit: a motor vehicle," only put him on notice of the state's intent to prove the dangerous nature enhancement, not the (factually identical) dangerous nature aggravating factor. But even accepting for the sake of argument the state could have made more clear its intent to use the dangerous instrument allegation as either an enhancer or an aggravator, Leday suffered no prejudice because he had actual notice that he would need to defend against the use of a dangerous instrument on all counts, and in fact did so.

¶ 37 Leday also attacks the particular aggravating factors the trial court found. First, he argues the court erred by finding the aggravating factor of emotional harm to P.B.'s immediate family after the jury had found that allegation not proven beyond a reasonable doubt. But because the jury found the dangerous instrument aggravating circumstance beyond a reasonable doubt with respect to the murder counts, the court was then free to find by a preponderance of the evidence other aggravating factors relevant to its exercise of discretion in selecting a sentence on those counts within the applicable statutory range. A.R.S. § 13–701(F); *Martinez*, 210 Ariz. 578, ¶¶ 26–27, 115 P.3d at 625–26. Testimony at the sentencing hearing provided sufficient evidence for the court to find emotional harm to P.B.'s family. And that the jury did not find harm to P.B.'s family proven beyond a reasonable doubt is not logically inconsistent with the court later finding that fact proven by a preponderance of the evidence. *See Watts*, 519 U.S. at 156–57.

¶ 38 Second, Leday challenges the trial court's finding of emotional harm to C.B.'s family as an aggravating factor at sentencing after the state had withdrawn that allegation during the aggravation phase. He argues the state circumvented his Confrontation Clause rights because he could have cross-examined the state's witnesses about this factor during the aggravation phase but could not do so at sentencing. *See Williams v. New York*, 337 U.S. 241, 250 (1949) (right of cross-examination does not apply at sentencing). He cites only *State v. McGill*, 213 Ariz. 147, ¶ 51, 140 P.3d 930, 942 (2006) and its discussion of *State v. Greenway*, 170 Ariz. 155, 161 n.1, 823 P.2d 22, 28 n.1 (1991), but those cases are inapposite because they deal with rebuttal testimony during the aggravation phase of a capital case. *See McGill*, 213 Ariz. 147, ¶¶ 49–52, 140 P.3d at 941–42. Leday has not shown those holdings extend to this circumstance or that the court erred. *See State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010) (defendant-appellant must establish error under any standard of review).

*9 ¶ 39 Third, Leday argues the trial court improperly considered lack of remorse in aggravation. But the court did not violate Leday's Fifth Amendment right to remain silent by relying on his refusal to admit guilt to aggravate his sentences for lack of remorse. *Cf. State v. Trujillo*, 227 Ariz. 314, ¶¶ 9–15, 257 P.3d 1194, 1197–98 (App. 2011). Indeed, Leday actually made an allocution statement at the sentencing hearing, saying "[i]t was an accident," he was "really sorry," and he "never meant to hurt anybody." Additionally, the court found Leday lacked remorse not based on anything he said or failed to say, but based on his escape from Tucson and attempted escape in Missouri. The court's finding did not intrude upon Leday's right to silence and was not error.

¶ 40 Leday's final argument is that the trial court made a clerical error in his sentence that we should correct pursuant to Rule 24.4, Ariz. R. Crim. P. As to Count Four, aggravated assault with a dangerous instrument against V.C., the court initially found the same three aggravating factors as it did in Counts One and Two, and imposed a maximum sentence of seven years under § 13–702(D). The court specified that the sentence in Count Two would be consecutive to that of Count One, and the sentences in Counts Four and Five [10] would be concurrent with each other and consecutive to the sentence in Count Two.

¶ 41 The trial court later amended the minute entry as to Count Four, striking the three aggravating circumstances it had previously found on that count and reducing the sentence to the presumptive term of 3.5 years. The amendment also stated the sentence in Count Four would commence "upon completion of the sentence of imprisonment previously imposed as to Count One," rather than the sentence previously imposed as to Count Two as originally ordered. The court said its original minute entry would "remain in full force and effect in all other respects."

¶ 42 We agree with Leday that the amendment's statement that the sentence in Count Four would commence upon completion of the sentence in Count One rather than the sentence in Count Two was a clerical error. Therefore, we correct the clerical error in the amendment to show that Count Four commences upon the completion of Count Two. [11]

Disposition

¶ 43 We affirm Leday's convictions and sentences, as corrected, for the reasons stated above.

All Citations

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Footnotes

1 After a couple of minutes on the telephone, P.B. said to the 9–1–1 operator "Just come over here now, would you? Before I hurt this guy right now."

2 At some point, P.B.'s girlfriend V.C. also got out of the car, but she could not remember anything that happened from that point until she woke up in the hospital severely injured.

3 Deoxyribonucleic acid.

4 V.C. could not be excluded as a DNA contributor to another sample taken from the car's undercarriage.

5 Leday was acquitted of attempted first-degree murder, and its lesser-included offense of attempted second-degree murder, as to V.C.

6 Leday concedes he was not entitled to a justification instruction as to the murder count involving C.B.

7 If the defendant actually knew of a prior violent act by the victim at the time of the crime, then that specific act may be admissible not as propensity evidence, but rather to show the defendant's state of mind at the time of the alleged crime and the reasonableness of his actions. *Fish*, 222 Ariz. 109, ¶¶ 36–38, 213 P.3d at 270–71; *see* Ariz. R. Evid. 404(b).

8 Leday appears to argue that evidence can never be unfairly prejudicial to the state, but he is mistaken. We have often upheld trial courts' preclusion of evidence as unfairly prejudicial to the state under Rule 403. *E.g.*, *State v. Foshay*, 239 Ariz. 271, ¶ 40, 370 P.3d 618, 626 (App. 2016) (evidence of victim's personal drug use).

9 Leday argues *Blakely* tacitly superseded this aspect of *Watts*, citing only a dissent from an Eighth Circuit opinion to support his position. *See United States v. Lasley*, 832 F.3d 910, 922 (8th Cir. 2016) (Bright, J., dissenting). But Arizona courts have rejected this position and continued to rely on *Watts* even after *Blakely*. *See, e.g.*, *State v. Yonkman*, 233 Ariz. 369, ¶ 14, 312 P.3d 1135, 1140 (App. 2013) (relying on *Watts* for proposition that "an acquittal carries no preclusive effect under a lesser evidentiary standard").

10 Count Five was aggravated assault causing serious physical injury to V.C.

11 Citing A.R.S. § 13–116, Leday also appears to argue the court erroneously ordered his sentences in Counts Four and Five to run consecutively. He is mistaken; the court ordered those sentences to run concurrently.

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